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No. 3[illegible]

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

THADDEUS G. BENTON AND J. LAMAR BUTLER,
Petitioners,

v.

GLENN McCARTHY, GLENN McCARTHY, INC., AND WILLIAM McCARTHY, *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Your petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit in the above entitled cause entered on April 29, 1960.

OPINIONS OF THE COURTS BELOW

The opinion of the United States Court of Appeals is quoted in full in the Statement of the Case, *infra*, p. 5, and in the Appendix, p. 1a. It is not yet reported in Federal 2d. That court's denial of appellants' petition for rehearing is quoted in the Appendix hereto, p. 3a, and it is not reported in Federal 2d.

The opinion of the United States District Court for the Southern District of New York is quoted in the Appendix and Brief for Appellants (R. 2030, Blue Cover) and is not yet reported in the Federal Supplement 2d.

JURISDICTION

The date of the judgment sought to be reviewed is April 4, 1959, and the time of its entry was April 29, 1960, upon denial of petition for rehearing. This Court by order entered July 22, 1960, extended the time in which petitioners may file this petition to August 9, 1960.

Section 1254 of Title 28 of the United States Code confers authority on this Court to review the judgment in question by writ of certiorari.

QUESTIONS PRESENTED

1. Whether the United States Court of Appeals ignored, disregarded, and failed to apply and enforce the applicable laws of New York State and Texas as declared by the Court of Appeals of New York, the courts of Texas and other state courts, and this Court, as the rule of decision, in violation of petitioners' Constitutional rights as established by this Court in *Erie* v. *Tompkins*, 304 U. S. 64, 82 L. ed. 1188? The Court neglected to apply the laws of New York and Texas applicable to the construction of a contract made and performed in New York, viz, that the principal-owner cannot rely upon non-performance of a condition precedent to escape liability to the broker when its non-performance was caused by his own fault, and the principal rescinded the contract with the purchaser by the payment of liquidated damages for his breach of contract. Without any legal authority, the Court

failed to hold defendants liable to petitioners for a commission for procuring a purchaser of real estate on terms acceptable to defendants because liability for the commission was conditional upon the payment of the purchase consideration, notwithstanding the fact that the principal failed to perform the condition precedent upon which the payment of the purchase consideration depended, and rescinded the contract with the purchaser in consideration of the payment to the purchaser of liquidated damages valued at $135,000. so as to be free to seek a better contract with another purchaser.

The disregard of the compelling rule of decision required by *Erie* v. *Tompkins*, the conflict between the decision below and the rule of decision in New York, as approved by this Court, are the predominant reasons for issuing the writ in this case.

Subsidiary Questions

2. Where the material issues in this action were adjudicated by the trial judge without a jury adversely to petitioners, upon conflicting and perjurious testimony of a party defendant then under indictment for a felony and then in fact guilty thereof as adjudicated after the decision in this action, in the United States District Court for the Southern District of New York, and upon false and conflicting representations to the Court by defendants' attorney who was also convicted as a co-defendant with such defendant in the said criminal proceeding, is the action ripe for reversal of the judgment or for a new trial?

3. Whether the Court of Appeals' omission to disturb the trial judge's resolution of the conflict in favor of defendants that the commission was payable

only "if and when such moneys were actually received" ignored the fact of the absence of any credible evidence that the parties had agreed to any such condition as the trial judge found, in disregard of its duty to consider the sufficiency of the evidence as required by FRCP 52 (b)?

4. Are defendants liable to petitioner Benton as well as to his co-broker, petitioner Butler, as matter of law?

5. Did the courts below err as matter of law in holdthat the individual principal and controlling stockholder of defendant corporation (Glenn McCarthy) is not jointly and severally liable with respondent corporation to petitioners—despite the fact that he acted in his individual capacity as the record owner of the concession, and in obligating himself to pay the commission?

STATUTE INVOLVED

Section 34 of the Federal Judiciary Act of September 24, 1789, Chapter 20, as amended, 28 U. S. C. section 1652 is as follows:

> "*State Laws as rules of decision.* The laws of the several states, except where the Constitution or treaties of the United States or acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply." (June 25, 1948, c. 646, 62 Stat. 944)

STATEMENT OF CASE: THE MATERIAL AND CONTROLLING FACTS

The basis of Federal jurisdiction in the District Court of the United States for the Southern District of New York is the diversity of citizenship of the parties plaintiff and parties defendant, the controversy

involving over $3,000 at date of action in 1955. Section 1332, Title 28 U. S. Code.

Facts Applicable to Question 1.

Butler is a lawyer of California; he was engaged in oil and gas matters for four years preceding the trial of this action. (R. 39-40, 309). Benton is a member of the bar of the District of Columbia and New York, experienced in the oil industry. (R. 398-490A, 450.

The opinion of the United States Court of Appeals is here quoted in full, as it expressly found the ultimate, controlling facts which compel the relief sought (App. 1):

> "Defendant Glenn McCarthy, the owner of an oil and gas concession in Bolivia, desired to obtain financing for the development of the concession through the sale of an undivided interest in the lease. Such an agreement was entered into by defendant corporation and Keljikan Commercial Corporation, *which purchaser was obtained through plaintiffs' efforts.* The defendants, however, were unable to procure guarantees from the Mutual Securities Agency against expropriation of the lease or as to conversion of the profits from Bolivian to American currency, *as was contemplated (required) by the agreement.* Hence, the agreement was terminated without any payment being made by Keljikan. (Parenthetical insert supplied, see infra, p. 9).
>
> "Plaintiffs allege an oral commission contract under which they were to receive a 10 per cent "carried" interest in the enterprise, plus 5 per cent of the purchase price. *Defendants' position is that the commission promised was a reasonable percentage of the financing obtained,* payable if and when such moneys were actually received. The District Court concluding that the "plaintiffs'

version of the transactions is not credible in the light of all the evidence and all of the facts and circumstances", found for the defendants.

"On this appeal, plaintiffs recite at some length the evidence adduced at the trial in an attempt to overturn the findings below. They have, however, succeeded only in demonstrating the *conflicting nature of the testimony.* Hence Judge Bryan's findings of fact cannot be found "clearly erroneous", F. R. 52 (a); and we can find no reason to disturb his resolution of the conflict in favor of the defendants. *The terms of the express contract found by the judge, conditioned upon the actual receipt of the financing payments by the defendant corporation, exclude any possibility of recovery in quantum meruit.*

Judgment affirmed." (Emphasis supplied)

The findings of the District Court are found in petitioners' "Appendix and Brief for Appellants" in blue cover, R. 2029-2059. Such findings are argumentative, and bear obvious adversary position to petitioners in attempted justification therefor, in total disregard of the inconsistent, contradictory, false and perjurious testimony by Glenn and William McCarthy, and the misrepresentations to the court by defendants' attorney, Mr. Mittelman, as so clearly shown in the Brief for Appellants in the Court of Appeals and Appellants' Petition for Rehearing in that court.

Petitioners assert with complete confidence that the findings that defendants' obligation under the express contract was conditioned upon the actual receipt of the "financing payments" is gross and clear error, and contrary to the only credible evidence in the record. But for the purpose of this petition petitioners will

assume that such was the condition of the contract, and show that the condition is not operative on the uncontradictable facts by compulsion of the New York rule of law.

The last full sentence of the opinion is illogical, totally inconsistent and erroneous, and without any support in law, and is in disregard of the New York law, based on the admitted facts that defendants' fault caused the nonperformance of the condition precedent to liability for the commission, viz. the consummation of the contract of sale. The court having expressly recognized the express contract of the parties, quantum meruit could not be a test, for that arises only upon a *quasi* contract. The issue is whether the express contract is enforceable as if the financing payments had in fact been received by defendant corporation because defendants' fault caused the nonpayment of the purchase price.

The Court of Appeals simply substituted its personal philosophy without basis in law, for the universal rule of law.

The court's conclusion, acknowledging the existence of an *express contract*, evidences (a) the disregard and violation of the New York and Texas rule of law,—the universal rule—that defendants cannot rely upon the non-performance of the condition precedent to their liability because their own faults and acts caused nonperformance of the condition precedent, which is conclusive on the admitted facts; (b) the disobedience to the opinion of this Court in *Erie v. Tompkins, supra*, and numerous opinions of this Court to the same effect; and (c) the denial to petitioners of their Constitutional rights.

The Court of Appeals found, as was defendants' admitted position, that "the commission promised was a reasonable percentage of the *financing obtained*, payable if and when such moneys were actually received." The court thus found an *express contract* to pay a "reasonable percentage of the financing *obtained*"—hence petitioners were not relegated to reliance upon a quasi contract or quantum meruit as the Court of Appeals mistakenly assumed. Such express contract finds written confirmation in defendants' registered letter to Butler of June 20, 1955 written concurrently with the execution of the written agreement with Keljikan Commercial Corporation, in which Glenn McCarthy confirmed his *individual* undertaking to pay Butler "the usual and customary finder's fee." (Pls.' Ex. 6, App. 3a, District Court's finding, R. 2049)

The District Court expressly found:

> "The *understanding always was* that Butler was to receive compensation by way of commissions of a reasonable amount, payable progressively upon the receipt of actual payments by Glenn McCarthy, Inc. from the proposed financier." (R. 2049)

The Court's finding that defendants were unable to procure the required guarantees from the Mutual Securities Agency against expropriation of the lease or as to the conversion of the profits from Bolivian to American currency, and that defendants terminated the agreement with Keljikan Commercial Corporation without any payments being made by Keljikan, is conclusive that defendants failed to perform the alleged condition, precedent to the payment of the purchase consideration, which they were bound to perform. Implicit in the finding is the recognition that it was

defendants' fault and failure to comply with the conditions precedent that caused the omission to pay the purchase consideration, which omission was the purchaser's right. The District Court had held:

> "However, Glenn McCarthy, Inc. was unable to comply with these conditions within a reasonable time after the execution of the contract." (R. 2038)

That defendants were bound to procure such guarantees as a condition precedent to the payment of the purchase consideration is conclusively established by the fact that the agreement of sale of June 20, 1955 provided that defendants "SHALL PROCURE" such guarantees (Pls.' Ex. 13, Part IF), whereas the earlier draft contract had provided merely that defendants should use their *best efforts* to procure the guarantees. (Defs.' Ex. G, p. #3)

Defendants' termination of the contract with Keljikan was not due merely to their fault and inability to perform. Defendants had the greedy purpose to seek greater financing and profit through Anaconda Copper Company, and to achieve that objective they had to be free of their obligation to Keljikan Commercial Corporation. (App., R. 2039)

So, to gain freedom of liability to Keljikan Commercial Corporation, defendants bought from it a release of liability, paying therefor a $\frac{1}{8}$ carried interest in the concession which it later sold for the equivalent of $135,000. (Pls.' Ex. 16; Defs.' Ex. D, App. 4a, R. 790-91, 804-5, 1242)

Defendant corporation thereupon, being free of commitment to the Keljikans, contracted on April 30, 1956 with Anaconda's subsidiary to sell it natural gas, but

additional capital of $5,000,000 would have been required to drill sufficient gas wells to warrant building a pipe line across the Andes at a cost of $30,000,000 (R. 785-7; Defs.' Ex. F, R. 797). Defendant Corporation hoped thereby that it could borrow the additional required capital, but failed. (R. 799-800). The ambition of McCarthy failed; and he had lost the benefits of the Keljikan contract with which he failed to comply.

Such admitted and uncontradictable facts demonstrate that defendants, by their own fault and breach of undertaking to Keljikan, and desire for greener pastures, and their buying freedom from the Keljikans, caused the non-performance of the condition precedent to liability for the commission to petitioners, which conduct fastens liability upon defendants for the commission as if the condition precedent had been fulfilled.

Lex Loci Contractus
Place of Performance

While the District Court found what "the understanding always was" (App., R. 2048), neither that Court nor the Court of Appeals found specifically where the contract-understanding was made. The District Court found conversations between Butler, William McCarthy, Cunningham (Glenn McCarthy's lawyer), and Glenn McCarthy regarding compensation. (App., R. 2032). They could have been only in New York State where the parties met.

The District Court noted that at the outset of the negotiations by McCarthy with the Keljikans in New York City he would not approve of the offering of only a 40% interest in the concession to the Keljikans. (App., R. 2051) Those conversations occurred only in New York City, for Glenn McCarthy's sworn answer

to written interrogatory No. 40 (R. 1401) shows that his *first meeting in New York City with Keljikan brothers when introduced by Butler "culminated in the execution of his contract with the Keljikans."* McCarthy further testified that he told Butler "from the beginning" in January or February in New York City that "we were not going to pay anything but the ordinary normal fees for such work" (R. 1912-1914). McCarthy had met the Keljikans in New York City in early May, 1955 by introduction of Butler. (R. 740-47, 888).

Glenn McCarthy's meetings with Butler were in New York City commencing in January, 1955 when he was engaged by McCarthy. (R. 42, 48, McCarthy, R. 840) Butler, from January through June, 1955 worked in New York City for McCarthy, at an expense of $20,000, spending all his time on the venture. (R. 230, 231). He testified that the commission would be payable when he brought defendants the purchaser and the contract of sale was signed. (R. 357).

Glenn McCarthy was engaged in New York City on several occasions in 1955, and as early as January, 1955 in seeking to finance the development of the concession, and met with all prospective financiers through Butler. (R. 551, 553, 571, 728-9, 844, 846, 1087, 1901, 1497).

Butler brought Glenn McCarthy and one Goodman, a prospective financier, together in New York City in May, 1955. (R. 99-100, 737-39.)

Butler's and Benton's services were rendered and performed in New York City, in creating the interest of Keljikan Commercial Corporation (R. 416-23)

which culminated in the execution of the contract of sale at Houston, Texas. (R. 1912-14)

Cunningham, McCarthy's attorney, had meetings with Butler in New York City throughout April, May and June regarding the desired financing. (R. 553-7, 1143, 1147-8, 1152-3, 1157-8, 1888) Cunningham assured Butler in New York City that if a transaction resulted with the Keljikans he was sure that reasonable compensation would be paid. (R. 1196)

The only other State in which the express contract found by the court could have been conceivably made with Butler, is Texas. The District Court found that defendants' promise to pay a reasonable commission for procuring the financing was conditioned on defendants' receipt of the purchase consideration, and that Glenn McCarthy made that plain to Butler in Houston, Texas, on their only meeting there on March 9, 1955 when commissions on a proposed transaction with another, one Pullman, were discussed. (App., R. 2048) Such latter finding was vigorously opposed by petitioners.

There can thus be no question that the express contract between the parties hereto was made and entered into in New York City, and modified in Texas if at all, and that the performance of the contract by petitioners occurred in New York City.

The rule of decision is, therefore, New York, or only conceivably in Texas; and the rule of decision in both states is identical, *infra*.

Facts Applicable to Subsidiary Question 2

The Court of Appeals held that petitioners had demonstrated "the conflicting nature of the testimony", but found no reason to disturb the trial judge's findings. The trial judge had held that on plaintiffs' version of the facts there was at least grave doubt as to whether Butler made out a prima facie liability and even greater doubt as to Benton; that insofar as the versions of the parties differ he found plaintiffs' version of the transaction (as to the promised commission of a ten per cent carried interest in the concession) is not credible in the light of all the evidence and all the facts; that it was inconceivable that defendants agreed to give each of petitioners a five per cent carried interest in the concession. Yet the trial judge acknowledged McCarthy's agreement to pay a reasonable commission for procuring financing of the concession, which they did. (R. 2047-48) The only controversy was as to the quantum of the commission, and when it would be earned, which the trial court found would be upon payment of the purchase consideration in contradiction of Butler's testimony that it was earned or payable upon his production of the financiers and the execution of the contract of sale. (Butler, R. 357)

The conflicting testimony consisted most largely of Glenn McCarthy's falsification of the facts, as set forth in "Appendix and Brief for Appellants" in the Court of Appeals (pp. 18-23, 59-73, in blue cover), and the falsification of the facts by William McCarthy as set forth in the Brief for Appellants in the Court of Appeals (Pp. 55-56; R. 1098-99, 1136-7, 1686).

The trial court was also undoubtedly influenced by false and inconsistent representations to the trial court

by Leo B. Mittelman, attorney for defendants, that there was not an iota of evidence that an "agreement was made with Glenn McCarthy" (R. 1275-6), in violation of the Federal criminal statute, section 1001 of Title 18 of the U. S. Code, contrary to the findings of the trial court and the Court of Appeals, contrary to Glenn McCarthy's testimony of his agreement to pay Butler the ordinary fees for such work (R. 1912-14), and, contrary to his affirmative declaration to the trial court that "we have never claimed that Lamar Butler is not entitled to compensation" (R. 578; admission of fact No. 47; R. 1241-42, R. 1900).

The findings of the trial court adverse to petitioners were induced largely not only by the conflicting and perjurious testimony of Glenn McCarthy, but by the perjurious testimony of William McCarthy, and the false declarations to the court by their attorney, Leo B. Mittelman,—both felons, as adjudicated after the trial of this civil action in the United States District Court for the Southern District of New York, as shown by certified judgments filed with the Clerk of this Court (App. 6a to 10a), of which this Court will take judicial notice.

Respondent William McCarthy was convicted on June 17, 1960 on his plea of guilty to the offense of using interstate telephonic communication in a scheme to defraud, using the mails in a scheme to defraud, and using the mails for sale and delivery of securities not registered with the SEC, and conspiracy to violate section 77 e (a) (1) and 77 e (a) (2) Title 15 U. S. C. —(Sec. 371, Title 18 U.S.C.) as charged in 37 counts. He was sentenced to 3½ years and fined $10,000 on count 50, and 3½ years on each of many counts, to

run concurrently, except that on four counts the sentence is to run consecutively. The sentence as to additional counts was suspended, and the defendant placed on probation at the expiration of the first prison sentence, on condition that he not engage directly or indirectly in the sale or marketing of securities or hold any position of a fiduciary nature.

Respondent, Mittelman, the lawyer for defendants in this action was convicted by the jury of using the mails in a scheme to defraud, Title 18, sec. 1341 and 2 U. S. C., conspiracy to violate 77 e (a) (1), 77 (e) (a) (2) and 77 x T. 15 U. S. C. He was sentenced to five years imprisonment on count 2 and five years and fined $10,000 on count 50, the prison sentences to run concurrently. He was placed on probation for five years upon the expiration of the first term of five years on condition that he not engage directly or indirectly in the sale or marketing of securities or hold any position of fiduciary nature.

If the common law rule and the Revised Statutes of New York prevailed, and defendant William McCarthy and his attorney Mittelman had been convicted at the time of this civil trial, they would have been disqualified as witnesses in this action. Under the present New York statute (Sec. 2444 Penal Law, McKinney's Consolidated Laws of New York Ann., Book 39, Part 2) while they would be permitted to testify, the weight of their testimony and declarations to the Court would have been subject to attack, and substantially destroyed.

As William McCarthy and Mittelman were in fact guilty of their crimes when they testified, and made false and contradictory representations to the trial

court in this action, their testimony was not worthy of belief and contributed to the conflict in the testimony of the witnesses, including the perjurious testimony of Glenn McCarthy, and resulted in the unfortunate resolution of the trial court, unwittingly and wrongfully in defendants' favor.

Such facts alone, if not the violation of *Erie* v. *Tompkins* which should be all sufficient for the issue of the writ, warrant the review of the decisions below, and their reversal.

Facts re Question 3

The United States Court of Appeals erred in not disturbing the trial judge's resolution of the conflict in favor of defendants that the commission was payable only "if and when such moneys (the purchase consideration) were actually received" by defendants. It merely held that petitioners succeeded in demonstrating the *conflicting nature of the testimony*, that the trial judge's findings cannot *therefore* be found "clearly erroneous", and that "we can find no reason to disturb his resolution of the conflict in favor of the defendants."

Such negative conclusion of the Court of Appeals, without an analysis of the facts of the conflicting nature of the testimony, and without analysis of the perjury committed by the individual defendants, and the misrepresentations of facts made by their attorney, is a lame conclusion upon its duty to consider "the sufficiency of the evidence to support the findings" as required by Federal Rule of Civil Procedure 52 (b), in the light of the glaring perjury by defendants Glenn and William McCarthy, the glaring misrepresentations to the court by their attorney, Mittelman, in violation

of the penal statute, sec. 1001, Title 18, U. S. C., and the fact that William McCarthy and defendants' attorney, Mittelman, were thereafter convicted of felonies of which they were in fact guilty at the time of their testimony.

The failure of the Court of Appeals to resolve factually the question of whether defendants Glenn and William McCarthy perjured themselves, and whether their attorney Mittelman made false representations to the trial court, material to the decision, is the best proof that the Court of Appeals abdicated its duty to really consider "the sufficiency of the evidence to support the findings" as treated fully in petitioners' brief in the Court of Appeals (blue cover, with Appendix) required by F. R. 52 (b).

The court's mere conclusion that, because petitioners proved the conflicting nature of the testimony, the trial court's findings cannot be found to be "clearly erroneous" is a non sequitur, and evidences the total failure of the court to adjudicate the issue.

The Court's omission to disturb the trial court's finding that the commission was payable "if and when such moneys were actually received" ignores the absence of any credible evidence that the parties had "agreed" to any such condition as the trial court found; and its recognition of the conflicting evidence and its failure to point to any credible evidence supporting the finding is conclusive that it abdicated its function to weigh the sufficiency of evidence to support the finding.

Petitioners contend that the findings were "clearly erroneous", and show that this Court stands in the same position as the United States Court of Appeals

with power to determine the issue, and to consider the sufficiency of the evidence. *U. S.* v. *Gypsum Co.*, 333 U.S. 364, 92 L. ed. 743; *McAllister* v. *U. S.*, 348 U.S. 19; *U. S.* v. *Oregon State Med. Soc.*, 343 U.S. 326.

Absent the valueless and unbelievable testimony of William and Glenn McCarthy, the record is void of evidence that could sustain the finding of the trial court that the promise of the commission was conditional upon the receipt of the purchase consideration. The record is thus barren of any "sufficiency" of credible evidence to support the finding, the finding is contrary to the affirmative evidence of petitioner Butler, and the finding is thus clearly erroneous.

The remedy for relief from perjurious testimony is for appeal to the appellate court, if time for a motion for new trial has expired, as here. *Steel* v. *Smelting Co.*, 106 U.S. 453.

Facts re Subsidiary Question 4, re Liability to Benton:

The District Court further found:

> "The only understanding of any kind which Glenn McCarthy, Inc. had with respect to compensation or commissions was with Butler. It may be that if Butler had become entitled to any commissions, Benton might have been entitled to share in them, but Benton had no independent rights whatsoever against Glenn McCarthy, Inc. or the individual defendants arising out of these transactions." (App. 2049)

The right of petitioner Benton to recover is thus involved in question 1.

The defendants' contract of sale of the interest in the concession of June 20, 1955 expressly provided that,

> "Seller will pay any brokerage, commission or finder's fees which may be or become payable by reason of seller and purchaser *executing this agreement*." (Pls.' Ex. 13, R. 1473, App. 2035)

Defendants thus acknowledged their recognition that the commission was earned upon the execution of the purchase agreement, and not upon the payment of the purchase consideration as found by the court below. That acknowledgment is further confirmation of defendants' *express undertaking* to pay a normal commission for brokerage, and the brokers were Butler and Benton.

The District Court expressly found as to the procuring cause of the contract of sale that plaintiff Benton introduced the Keljikan Brothers to plaintiff Butler and that Butler introduced the Keljikans to the defendants. (App. 2035). That was in N. Y. City. The same Court of Appeals has held that the right to commissions is not lost because the broker does not participate in the negotiations, where the agreement was to pay the standard commission to the broker who made the sale. *Risser* v. *Hirshorn*, 199 F. 2d 917, 2nd Cir.

Benton is a proper co-plaintiff, as Butler had in writing promised him a five per cent undivided interest in the concession if it were the subject of financing by Keljikan Commercial Corporation (Defs.' Ex. A, Butler, R. 330-31, Benton, R. 401.) McCarthy's attorney, Cunningham, knew all about Benton's services as broker, which was sufficient knowledge to defendants, and they accepted the benefits of Benton's services with full knowledge. (R. 141, 339, 434-6, 472, 475, 1193-6, 1223-30, 1864, 1907-8, 1914-15). Butler on July 17, 1956 promised to share with Benton equally what-

ever he should receive for their services if Benton should not recover individually from defendants. (Pls.' Ex. 24)

Facts re Subsidiary Question 5, re Joint and Several Liability of Glenn McCarthy individually and Glenn McCarthy, Inc.

Glenn McCarthy was the individual owner of the Bolivian concession at the time of his dealings with Butler and of the execution of the sales contract of June 20, 1955 (R. 552); and title remained in him individually as late as September 29, 1955 (R. 554, 577).

Glenn McCarthy was at all times president, the controlling stockholder, and principal creditor of the corporation. (R. 548, 553).

It was Glenn McCarthy individually who assumed responsibility and liability to petitioners to pay the commission. He testified that "it was my agreement to pay" the commission and that I have always agreed that *I* was supposed to pay him a commission." (R. 607)

McCarthy testified that Butler "was not hired by DEFENDANT CORPORATION" (R. 1691); that "Mr. Butler was working for me as a broker" (R. 1674-76); and thus it is conclusive that he assumed liability personally.

In his only writings, Glenn McCarthy individually assumed the liability for the commission, first in his letter of March 9, 1955 to Butler's associate, Hardy & Keyes, in which transaction Butler was interested, w' n he wrote:

> "*I* hereby agree to pay you" etc. in the event "*I* or my company consummate a deal" (Pls.' Ex. 4, R. 735, R. 126-127);

and, secondly, in his letter of June 20, 1955 to Butler, written concurrently with the execution of the sales' contract of June 20, 1955, in which he confirmed that "*I* will pay you the usual and customary finder's fee", that "*I* am willing to pay the maximum fee" etc., thus confirming his individual undertaking to pay Butler the commission. (R. 2049; Pls.' Ex. 6, App. 3a)

In both writings, McCarthy signed them individually, and not as president of the corporation. He at all times acted as the individual Lord of all he surveyed, and was responsible individually for all he did.

He individually conducted all negotiations, and there is no evidence whatever of any authorization by defendant corporation of an undertaking to petitioners, excepting its ultimate acceptance of the benefits of their work, with full knowledge of resulting liability, jointly and severally.

The District Court's finding that Glenn McCarthy did not enter into any arrangement individually with petitioners is grossly and clearly erroneous.

REASONS FOR GRANTING THE WRIT

The predominant and impelling reasons why the writ should be granted are (a) the denial of petitioners' Constitutional right to have their contract rights determined according to the law of New York, or Texas, as required by this Court's opinion in *Erie* v. *Tompkins*, *supra*, and successive opinions; and (b) the departure from and conflict with the numerous decisions of this Court, its own prior good decisions, and decisions of the Court of Appeals of New York and Texas.

It was defendants' fault, breach of contract with the Keljikans, and greedy purpose of seeking financing

in greater sums from others than the purchaser obtained by petitioners that prevented the payment of the purchase consideration by the Keljikans and caused the cancellation of the contract of sale at a cost to defendants of the equivalent of $135,000. Hence, as defendants' fault and affirmative act of buying off the purchaser provided by petitioners, by reason of their failure to comply with their express undertaking, caused the non-performance of the condition precedent to defendants' liability to petitioners (i.e., the payment of the purchase consideration), defendants are as liable to petitioners as if the condition precedent had been performed.

This Court in *Erie* v. *Tompkins*, held that "the law to be applied in any case is the law of the state", whether by its "highest court in a decision is not a matter of federal concern." 304 U.S. 78. It held that any other rule would invade the rights "which in our opinion are reserved by the Constitution to the several states."

In diversity of citizenship cases, the construction of contracts and the rights and obligations of the parties are governed by state law. *Baumer* v. *Franklin Distilling Co.*, C.C.A. Ky., 1943, 135 F. 2d 384, certiorari denied 64 S. Ct. 54, 320 U.S. 750, 88 L. ed. 446; *Reed & Prince Mfg. Co.* v. *Lear, Inc.*, 78 F. Supp. 394, affirmed 174 F. 2d 208; *Russell* v. *Barnes Foundation*, 52 F. Supp. 827, affirmed 143 F. 2d 871, certiorari denied 65 S. Ct. 122, 323 U.S. 771, 89 L. ed. 616; *Risser* v. *Hirshhorn*, C. A. N. Y. 1952, 199 F. 2nd 917.

The rule of decision on the plain facts of this action, in New York and Texas,—if indeed not the universal rule as the Texas court noted (*infra*),—is:

Corpus Juris, Vol. 17, section 468:

"B Conditions Precedent

One who prevents the fulfillment of a condition precedent or its performance by the other party, may not take advantage of his act, and the performance of the condition is excused.

Where a contract is performable on the occurrence of a future event, there is an implied agreement that the promisor will place no obstacle in the way of the happening of such event, particularly where it is dependent in whole or in part on his own act; and, where he prevents the fulfillment of a condition precedent or its performance by the adverse party, he cannot rely on such condition to defeat his liability."

The New York Rule

The New York rule of law is firmly established by the Court of Appeals of New York, The Supreme Court of the United States, and the United States Court of Appeals for the Second Circuit.

In *Wagner* v. *Dorecktor*, 306 N. Y. 386, 118 N. E. 2d 570 (1954), the court reannounced the law to be:

"Over a century ago we reasserted the then well settled rule that a party cannot insist upon a condition precedent *when its non-performance has been caused by himself*. Young v. Hunter, 6. N.Y. 203, 207."

In that case the brokerage contract required the defendant to "split *the net proceeds of the sale of beef*," to be divided equally at the time the proceeds of the letter of credit were made available to defendant, *thus requiring a consummation of the contract and realization of "net proceeds" as a condition to the payment of*

the commission. The court held that the plaintiff could recover *if he showed that defendant's own wrong caused his non-performance of the contract of sale.* The court also noted that defendant's "own wrong" would include acts "committed with *a view to release him of his lawful obligation to plaintiffs . . .*". The decision applies perfectly to the facts in this case where the defendant failed to comply with the conditions it represented it could and would readily perform, and where it bought a release of its obligations to the Keljikans so that it would be free to negotiate a more favorable contract with others. Such purposes were the sole, direct cause of the non-performance by Keljikan Commercial Corporation of the alleged condition precedent *allegedly* imposed by the defendant corporation and Glenn McCarthy.

This Court settled the question that the seller's fault in not consummating the sale does not relieve him of liability for the commission:

Gaston, etc. Ltd. v. *Warner*, 260 U. S. 201 (1922), affirming 272 F. 56 (2nd circuit, 1921):

The broker was hired to obtain a purchaser for defendant's ship. The contract of sale to the purchaser was rescinded for inability of the seller to obtain a consent required from the British government. The court held that the owner's *inability to consummate the transaction was no defense* to the action for the commission, even if under British law the contract was void.

Dotson v. *Milliken*, 209 U. S. 237 (1908):

There the seller agreed that Milliken, the broker, would receive $2.50 per acre for each acre of land he

would sell at $20, the owner representing that a railroad had agreed to build a line onto the property upon which the broker and purchaser relied. The fact was developed that no such commitment to build the line had been obtained, and the transaction therefore failed. The broker had relied upon the owner's representations and obtained the ready purchaser (as on this appeal), and Justice Holmes held that the broker was entitled to his commission because the representations were not true. (On this appeal, the appellants and the purchaser had relied upon McCarthy's representation that he could readily obtain the required guarantees, and he bought off the purchaser for his breach of contract to free him to search for a still better deal, when he had suffered an inability to obtain the guarantees within any reasonable time.) The court cited the *Gaston* decision, *supra*, and *Willard* v. *Preston*, 92 F. 2d 851 (8th Cir., 1937).

The U. S. Court of Appeals for the Second Circuit had also conclusively applied the foregoing authorities:

Baldwin v. *Jardine Matheson & Co.*, 261 F. 861 (2nd Cir., 1919):

There the brokerage agreement was for the commission to be such *a sum of money as was RECEIVED in excess of $8.50 per box of tin plate*. The broker obtained a purchaser for 10,000 boxes at $9.25 per box. The seller refused to make delivery, feeling that he had to receive more money for the shipment, and that the buyer had to give cash or certified check. Agreement was reached on all terms, but afterward the seller notified the buyer that the sale was off because one of the representatives of the buyer had no right to bind the buyer, so they believed. The court held that even if

the representative did not have the authority, his acts were ratified. It expressly held:

> "There is no difference between failure to perform because of bad faith *or inability*" of the seller, (p. 865)

citing the *Dotson* decision, *supra.*

The further controlling New York decisions are:

Tanenbaum v. *Bochm*, 202 N. Y. 293:

There, defendant engaged plaintiff to find a long term tenant for defendant's property. Plaintiff did so. Defendant and the tenant agreed upon the terms of the lease. Defendant's attorney prepared the lease, defendant insisting upon summary proceedings rather than ejectment. It was held that the failure of closing was the defendant's fault, and that the plaintiff was entitled to his commission. The decision controls the instant appeal.

Mengel v. *Lawrence*, 276 App. Div. 180, 93 N.Y.S. 2d 443 (1st Dept. 1949):

There the broker was engaged to sell defendant's property for $130,000 cash. The broker procured the purchaser. Seller declined to consummate the transaction because of the purchaser's race or religion. Holding that the completion of the sale was prevented by defendant's action, the court said:

> "The defendant should not be permitted to take advantage of conditions precedent unperformed when she herself occasioned their non-performance."

citing *Sibbald* v. *Bethlehem Iron Co.*, 83 N.Y. 378.

Stern v. *Gepo Realty Corporation*, 289 N. Y. 274, 45 N.E. 2d 440 (1942): There the agreement to pay the

commission *was "in connection with the sale, WHEN AND IF CONSUMMATED . . .",*—the exact *alleged* condition precedent in this case. Because the seller did not remove certain taxes and encumbrances the buyers properly declined to consummate the transaction, as here, the declination being held to be justified. The court held that the seller could not contract to deliver title free of encumbrances, fail to remove them, cause the title to be rejected, and thus cause the loss of the commission to the broker. There, the court restated the rule to be that "*one may not take advantage of a condition precedent, the performance of which he has rendered impossible.*"

O'Hara v. *Bronx Consumers' Ice Co.*, 254 N. Y. 210, 172 N. E. 472 (1930):

The court there stated the facts and the decisive rule:

> "The defendant had breached its contract with the plaintiff. It had represented that there were no restrictive covenants which constituted an encumbrance upon the property when in fact there existed such an encumbrance. *It thereby prevented the sale which had been arranged by the plaintiff and was liable to him for the agreed commission.*"

In this action defendants had represented that they could readily obtain the guarantees, and their contract required that they "shall procure" the guaranties. They failed. They sought to make a better deal with Anaconda and others. Those acts prevented the consummation of the sale. They bought off the Keljikans from their breach of contract. They are liable for the commission. In the *O'Hara* case the Court of Appeals referred to the owner's "assumption of risk" in binding him to the broker.

Murray R. Realty Co. v. *Pres., Etc., of the Manhattan Co.*, 162 Misc. 21, 293 N.Y.S. 605 (App. T. 1st Dept.) (per Cur.), affirmed per curiam, 251 App. Div. 717, 298 N.Y.S. 176 (1937):

There, the seller attempted to change one of the terms in the proposed contract, which its representative had transmitted to plaintiff. The court held that the plaintiff could recover *notwithstanding the existence of a writing to the effect that no commission would be earned until title actually passed.* A leading decision of *Colvin* v. *Post*, 225 N.Y. 516, was cited. In that decision the Court of Appeals stated:

> "* * * The broker may if he chooses agree that if the sale fails through because of the seller's fault, he shall be entitled to nothing. Commonly, however, such is not the meaning of the parties, and the agreement should not be so construed unless such a result is clearly intended. (Seymour v. St. Luke's Hosp., 28 App. Div. 119; Larson v. Burroughs, 131 App. Div. 877) * * *
>
> "But if the sale fails *through the seller's fault*, a very different situation rises. We do not find expressed or implied in this contract any indication of an intention that in such event the broker shall lose what he has earned."

Holman v. *Patten*, 227 N. Y. 22, 124 N. E. 86 (1919):

Defendant requested plaintiff to obtain a loan for him on his real estate. As commission he promised to pay "8½ per cent on the amount of the loan." Defendant agreed to and attempted to furnish a title policy, but as it left one boundary line indefinite which could not be cured, the loan was not made. The court held that the broker could recover, saying:

> "The defendant did not perform the obligation on his part entitling him to the loan. Hanford did

> fully perform the obligation entitling him to the agreed compensation and expenses."

Any good faith of the borrower certainly was not deemed any basis for relieving him of liability for the commission.

Green v. *Foreman*, 53 N.Y.S. 2d 863 (Monroe Co., 1945):

Defendant promised the commission upon a sale by plaintiff, although it was not completed until after the termination of the agreement with the broker. The court held that defendant's failure to take steps to prove title was the sole reason why the sale and conveyance of the property was not completed with the purchaser produced by plaintiff, and that the broker was entitled to the commission. Similarly, in this appeal, the defendant McCarthy could not timely produce the guarantees which it had represented it could readily obtain; and, besides, McCarthy was ambitious to make a better deal with Anaconda and others, and bought off the Keljikans for his breach of contract.

The Texas Rule is the Same as New York

The Texas rule of decision on the question is identical with the New York rule:

The rule is well stated in *Elberts* v. *Carpenter Production Co.*, Civ. App. 256 S. W. 2d 601, err. ref. no rev. error:

> "In order to recover money conditionally promised, promisee must prove that condition has happened, or, if happening of condition depends upon promisor's performance and promisor has refused to perform, that condition would have happened if promisor had done what he agreed to do.

> "Where occurrence of condition upon which liability is conditioned is prevented by promisor's deliberate act or negligence promisor will be held absolutely bound to give promised performance."

In the following Texas decisions, the rule was stated to be a universal maxim:

> *Miller* v. *Hodges* (Tex. Com. Apps.), 260 S.W. 168, 172;
> *Sanderson* v. *Sanderson*, Com. Apps., 109 S.W. 2d 744, affirming Civil Appeals, 82 S.W. 2d 1008;
> *Dodds* v. *Wedegartner*, Civ. App. 69 S.W. 2d 164;
> *Hoffman* v. *Overton Refining Co.*, Civ. App. 110 S.W. 2d 93.

In the *Dodds* case it was held:

> "Recovery may be had as if act had been performed under contract where party in whose favor act was to be performed prevented performance and other party was not in default."

The Court held that plaintiff may recover *on the contract* where performance is wrongfully prevented by the other party, *or on a quantum meruit* at his election.

CONCLUSION

The disregard of law by the United States Court of Appeals, on the uncontradictable facts, denies petitioners their Constitutional rights.

The substitution of the personal philosophy of the judges, for the law is a travesty upon the law, and a tragedy to petitioners, and warrants correction by the powers of this Court.

The unopposed testimony of petitioners' three expert witnesses shows that the minimum normal fees in New York for providing the purchasers (Keljikan Commer-

cial Corporation), as promised by defendants, was ten per cent of the promised purchase consideration, or $454,000. Petitioners' services were of unique and special value to defendants as proved by their subsequent need to sell the *whole* interest in the concession to others for only $1,500,000 cash plus $1,500,000 payable only from ½ of the expected net profits from the concession, contrasted with the rate of $6,060,000 at which a half interest was sold to the Keljikans for $3,030,000. (R. 439-42, 446-52, 454, 492, 526-29, 530-32, 539-42, 800-8, 1480, 1840; Pp. 87-93 "Appendix and Brief for Appellants' in Court of Appeals.)

It is therefore prayed that the Court will issue its writ of certiorari to prevent the denial of a Constitutional right and to prevent a manifest injustice.

THADDEUS G. BENTON
Petitioner Pro Se, and Attorney For Petitioner J. Lamar Butler.
1111 Army Navy Drive,
Arlington, Virginia

NELSON OLCOTT,
1 East 42nd St.,
New York, N.Y.

LAWRENCE W. KRIEGER,
230 Park Ave.,
New York, N.Y.

LESLIE W. GALLT,
55 Liberty Street,
New York, N.Y.

Of Counsel.

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 233—October Term, 1959.

(Argued March 11, 1960 Decided April 4, 1960.)

Docket No. 25928

THADDEUS G. BENTON and J. LAMAR BUTLER,
Plaintiffs-Appellants,

—v.—

GLENN McCARTHY, GLENN McCARTHY, INC., and
WILLIAM McCARTHY, *Defendants-Appellees*.

Before: CLARK, WATERMAN and LEWIS,* *Circuit Judges*.

Appeal from the United States District Court for the Southern District of New York, Frederick vanPelt Bryan, *Judge*.

Plaintiffs appeal from a judgment for defendants denying their claims for agents' or brokers' commission.

THADDEUS G. BENTON, New York City (Neilson Olcott, Lawrence W. Krieger, and Leslie W. Gallt, New York City, on the brief), *appellant pro se and for appellant J. Lamar Butler*.

LEO B. MITTELMAN, New York City, for defendants-*appellees*.

PER CURIAM:

Defendant Glenn McCarthy, the owner of an oil and gas concession in Bolivia, desired to obtain financing for the development of the concession through the sale of an un-

* Of the Tenth Circuit, sitting by designation.

divided interest in the lease. Such an agreement was entered into by defendant corporation and Keljikan Commercial Corporation, which purchaser was obtained through plaintiffs' efforts. The defendants, however, were unable to procure guarantees from the Mutual Securities Agency against expropriation of the lease or as to conversion of the profits from Bolivian to American currency, as was contemplated by the agreement. Hence the agreement was terminated without any payments being made by Keljikan.

Plaintiffs allege an oral commission contract under which they were to receive a 10 per cent "carried" interest in the enterprise, plus 5 per cent of the purchase price. Defendants' position is that the commission promised was a reasonable percentage of the financing obtained, payable if and when such moneys were actually received. The district court, concluding that the "plaintiffs' version of the transactions is not credible in the light of all the evidence and all of the facts and circumstances," found for the defendants.

On this appeal, plaintiffs recite at some length the evidence adduced at the trial in an attempt to overturn the findings below. They have, however, succeeded only in demonstrating the conflicting nature of the testimony. Hence Judge Bryan's findings of fact cannot be found "clearly erroneous," F. R. 52(a); and we can find no reason to disturb his resolution of the conflict in favor of the defendants. The terms of the express contract found by the judge, conditioned upon the actual receipt of the financing payments by the defendant corporation, exclude any possibility of recovery in *quantum meruit*.

Judgment affirmed.

Before CLARK, WATERMAN, and LEWIS, Circuit Judges.

On Petition for Rehearing.

Thaddeus G. Benton, Arlington, Va. (Neilson Olcott, Lawrence W. Krieger, and Leslie W. Gallt, New York City, of counsel), appellant pro se and for appellant J. Lamar Butler.

PER CURIAM.

Petition for rehearing denied.

C.E.C.
S.R.W.
D.T.L.
U.S.C. JJ.

Apr. 29, 1960

Plaintiffs' Trial Exhibit 6

GLENN McCARTHY, INC.
2121 WEST HOLCOMBE BLVD.
HOUSTON 25, TEXAS

June 20, 1955

Mr. J. Lamar Butler,
% Plaza Hotel,
New York City, N.Y.

Re: Glenn McCarthy, Inc.

Dear Lamar:

This is to advise you that your proposal with respect to payment for your services in connection with the private financing of the subject Company has been presented to me for my consideration, and that the same is totally unacceptable. This is also to advise you that I do not know Messrs. Thaddeus Benton and Ralph A. Hopkins, and that I have never discussed the Company or this matter with either of such persons, and that I do not consider myself

obligated to make payment of any amount to either of such persons.

You have always been advised by me that exorbitant finder's fees would not be tolerated by the purchaser and I am advised the trade would not be consummated if such were the case, as contemplated by you.

I will pay you the usual and customary finder's fee. I have investigated the matter through brokerage concerns located in this City and I have been advised that such fee in this matter would be from 2% to 2½% of the funds ultimately received by the Company as a result of the efforts of the finders. Therefore, I am willing to pay you the maximum fee of 2½% of the funds received from Keljikan Commercial Corporation, or its nominees, when, as and if such funds are received. Under the terms of the agreement I am presently discussing with Keljikan Commercial Corporation you would receive $50,000 in the aggregate, payable as follows: $6,250 on the day that the first payment is made by Keljikan Commercial Corporation and the balance at the rate of $2,500 per month as monthly payments are made by Keljikan Commercial Corporation.

Yours very truly,

GLENN H. McCARTHY

Glenn H. McCarthy

Plaintiffs' Trial Exhibit 16

April 23, 1956

Glenn McCarthy, Inc.
2131 West Holcombe Boulevard
Houston 25, Texas

Re: Bolivian Concession

Dear Sirs,

The contracts between us dated June 20, 1955 and June 30, 1955, have resolved themselves into the circumstances

that because of the long delays in obtaining the necessary MSA guarantees and assurances in accordance with the contracts we have been unable to go forward with the contemplated investment on our part and as a result, although we have gone to very considerable expense and effort in the matter over the past period of nearly a year, we are not, because of the absence of such guarantees and assurances, prepared immediately to proceed with the financing.

Appreciating the fact that you have exerted every possible effort to obtain the necessary guarantees and assurances, we can not continue to hold the matter open. In lieu of any and all claims which we might assert, but without your admitting or conceding any liability we have agreed between us that you will assign to us without further consideration a one-sixteenth carried working interest in the Bolivian concession, which is the subject of said contract, within thirty days from the date hereof in manner and form satisfactory to our counsel so as to convey to us the said one-sixteenth carried working interest. Upon the completion of such assignment, said contracts of June 20, 1955 and June 30, 1955, shall thereupon be deemed terminated, without further obligation on the part of either of us to each other.

Please be assured that we regret the circumstances which have brought about this termination unsatisfactory to both of us and assure you of our continued friendship.

Upon signature by you at the foot of a duplicate of this letter this will constitute an agreement between us.

Very truly yours,

KELLIKAN COMMERCIAL CORPORATION

By ROBERT B. KELLIKAN

GLENN McCARTHY, INC.

By GLENN H. McCARTHY
President

Defendants' Trial Exhibit E

April 23, 1956.

Glenn McCarthy, Inc.,
Houston, Texas.

Gentlemen,

Further with reference to our termination agreement signed this day it is understood and agreed between us that we will not assert any claim against Glenn McCarthy, Inc. for any services rendered by us in the negotiating of the Anaconda gas fuel contract, if such should be made.

We have been most happy to have been of service to you in connection therewith, and we sincerely hope that you will be able to consummate your arrangements and arrange for the necessary financing.

Very truly yours,

KELJIKAN COMMERCIAL CORP.
By

Judgment and Commitment

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

No. Cr 157-56

UNITED STATES OF AMERICA

v.

WILLIAM J. McCARTHY

On this 17th day of June, 1960 came the attorney for the government and the defendant appeared in person and by counsel.

IT IS ADJUDGED that the defendant has been convicted upon his plea of guilty of the offense of using interstate

telephonic communication in a scheme to defraud. T. 18 Sec 1343 & 2. Using the mails in a scheme to defraud. T. 18 Sec 1341 & 2. Using the mails for sale and delivery of securities not registered with S.E.C. T. 15 USC Sec 77e (a) (1) & 77x and 77e (a)(2). Conspiracy to violate Sec 77e(a)(1), 77e (a)(2) T. 15 USC—(Sec. 371 T 18 USC) as charged in 37 counts and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Three and one half years and fined $10,000.00 on count 50; Three and one half years on each of counts 1, 2 and 34 to run concurrently with each other and to the sentence imposed on count 50; Three and one half years on each of counts 4, 5, 6, 7, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 30, 31, 32, 38, 39, 40, 43, 46, 47 and 48 to run concurrently with each other but consecutively to the prison sentence imposed on counts 1, 2, 34, 50.

The execution of the sentence imposed on each of counts 4, 5, 6, 7, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 30, 31, 32, 38, 39, 40, 43, 46, 47 and 48 is suspended. Defendant placed on probation for Three and one half years to begin at the end of the prison sentence imposed on cts. 1-2-34 & 50. Condition of probation that defendant shall not engage directly or indirectly in the sale or marketing of securities or hold any position of a fiduciary nature. Probation subject to the standing probation order of this court. Defendant to stand committed until fine is paid or otherwise discharged according to law. Remanded.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Mar-

shal or other qualified officer and that the copy serve as the commitment of the defendant.

LLOYD F. MACMAHAN
United States District Judge.

The Court recommends commitment to:[6]

HERBERT A. CHARLSON
Clerk.

A TRUE COPY
HERBERT A. CHARLSON
Clerk, U. S. District Court for
Southern District of N. Y.

Seal

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[1] Insert "by counsel" or without counsel; the court advised the defendant of his right to counsel and asked him whether he desired to have counsel appointed by the court, and the defendant thereupon stated that he waived the right to the asssitance of counsel." [2] Insert (1) "guilty," (2) "not guilty, and a verdict of guilty," (3) "not guilty, and a finding of guilty," or (4) "nolo contendere," as the case may be. [3] Insert "in count(s) number " if required. [4] Enter (1) sentence or sentences, specifying counts if any; (2) whether sentences are to run concurrently or consecutively and, if consecutively, when each term is to begin with reference to termination of preceding term or to any other outstanding unserved sentence; (3) whether defendant is to be further imprisoned until payment of the fine or fine and costs, or until he is otherwise discharged as provided by law. [6] For use of Court wishing to recommend a particular institution.

Judgment and Commitment

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

No. Cr 157-56

UNITED STATES OF AMERICA

v.

LEO B. MITTELMAN

On this 17th day of June, 1960 came the attorney for the government and the defendant appeared in person and[1] by counsel.

IT IS ADJUDGED that the defendant has been convicted upon his plea of[2] not guilty and a verdict of guilty by a jury of the offense of using the mails in a scheme to defraud T 18 Sec 1341 & 2 USC; Conspiracy to violate Sec. 77e(a)(1) 77e (a) (2) & 77x T. 15 USC as charged[3] 2 and 50 and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of[4] Count two—Five Years, Count 50—Five Years and fined $10,000.00 Prison sentence on count 50 to run consecutively to the prison sentence imposed on count 2.

Execution of prison sentence imposed on count 50 is suspended and defendant placed on probation for five years to begin at the end of the prison sentence imposed on count two, subject to the standing probation order of this court. Further condition of probation that defendant

shall not engage directly or indirectly in the sale or marketing of securities or hold any position of fiduciary nature. Defendant to stand committed until fine is paid or otherwise discharged according to law. Bail fixed in the sum of $5,000.00 pending appeal, to be furnished by 5 PM.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

Lloyd F. MacMahan
United States District Judge.

The Court recommends commitment to:[6]

Herbert A. Charlson
Clerk.

A True Copy
Herbert A. Charlson
Clerk, U. S. District Court for
Southern District of N. Y.

Seal

---

[1] Insert "by counsel" or without counsel; the court advised the defendant of his right to counsel and asked him whether he desired to have counsel appointed by the court, and the defendant thereupon stated that he waived the right to the asssitance of counsel." [2] Insert (1) "guilty," (2) "not guilty, and a verdict of guilty," (3) "not guilty, and a finding of guilty," or (4) "nolo contendere," as the case may be. [3] Insert "in count(s) number " if required. [4] Enter (1) sentence or sentences, specifying counts if any; (2) whether sentences are to run concurrently or consecutively and, if consecutively, when each term is to begin with reference to termination of preceding term or to any other outstanding unserved sentence; (3) whether defendant is to be further imprisoned until payment of the fine or fine and costs, or until he is otherwise discharged as provided by law. [6] For use of Court wishing to recommend a particular institution.

Septe

FILE COPY

Office Supreme Court, U.S.
FILED
SEP 9 1950
CHARLES ELMORE CROPLEY, Clerk

No. 308

IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

THADDEUS G. BENTON and J. LAMAR BUTLER,

Petitioners,

vs.

GLENN McCARTHY, GLENN McCARTHY, INC., and WILLIAM McCARTHY,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

[redacted]
Attorneys for Respondents
[redacted]
New York 17, N. Y.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No.

THADDEUS G. BENTON and J. LAMAR BUTLER,
Petitioners,

v.

GLENN McCARTHY, GLENN McCARTHY, INC., and WILLIAM McCARTHY,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

Preliminary.

The petition seeks to review a judgment of the United States Court of Appeals for the Second Circuit, which unanimously affirmed a judgment for defendants dismissing plaintiffs' action for money damages for alleged breach of contract after a trial without jury before Frederick van Pelt Bryan, Judge.

Opinion of the District Court.

Perhaps because they govern the consideration and disposition of this case, the petition omits the opinion of the District Court which contains the findings of fact unanimously affirmed below. It is printed as an appendix hereto, and it disposes of the petition on its face.

Questions Presented.

(a)

Petitioners contend that the courts below rendered a decision involving an important state question in a way in conflict with applicable state law. The alleged important question is whether a principal may rely upon non-performance of a condition precedent to escape liability for commission to a broker if non-performance is the fault of the principal.

It is plain from the findings below that this question is not in the case. The District Court found: that the frustration of the financing agreement brought about by the plaintiff's efforts was not the result of non-performance of a condition precedent; that the financing agreement was terminated in good faith, and by reason of circumstances beyond the control of the parties; and that the express understanding with the broker was that commissions were payable only out of funds advanced for financing the venture. It is conceded that no such funds were raised or provided.

(b)

Petitioners further contend there was no credible evidence to support the finding that the commission agreement required the receipt of money by the principal from financiers before liability for commission attached.

As to this the Court of Appeals said:

> "On this appeal, plaintiffs recite at some length the evidence adduced at the trial in an attempt to overturn the findings below. They have, however, succeeded only in demonstrating the conflicting nature of the testimony . . ."

Statement of Case.

Judge Bryan's opinion and findings sufficiently outlines the case for present purposes. This was a simple brokerage case tried in a federal court merely because of diversity. The issues were ultimately determined in conflicting testimony. Nothing else is involved.

I.

The Petition is Frivolous.

As stated above this was a simple brokerage case. Federal jurisdiction was based solely on diversity of citizenship. No question of federal law was involved, nor any controversial question of state law. Review of the findings of fact is precluded by Rule 52(a) of the Federal Rules of Civil Procedure; and those findings compelled the conclusion of law below.

Nothing in this case approaches the standards of Rule 19 of this Court, as a basis for the exercise of its discretion in petitioner's favor.

Conclusion.

The petition for a writ of Certiorari should be denied.

Respectfully submitted,

EDWARD M. GARLOCK,
Attorney for Respondents.

APPENDIX.

Opinion No. 25053.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

CIV. 106-314.

THADDEUS G. BENTON,

Plaintiff and

J. LAMAR BUTLER,

Intervenor and Third Party Plaintiff,

vs.

GLENN MCCARTHY, GLENN MCCARTHY, INC. and WILLIAM MCCARTHY,

Defendants.

Appearances:

THADDEUS G. BENTON, Esq., Attorney for Plaintiff and Intervenor and Third Party Plaintiff: Thaddeus G. Benton, Esq., and C. Joseph Hallinan, Esq., of Counsel.

LEO B. MITTELMAN, Esq., Attorney for Defendants.

Bryan, J.:

The Court: Gentlemen, I have followed the testimony here very closely as it went along and I have reviewed the evidence over the weekend and given the matter thorough study and consideration, and I have also examined the vari-

ous authorities submitted by the parties and some on my own. So I am prepared to give you what will be an informal oral decision.

The issues here, as framed by the pretrial order, are, some nine in number. In addition to the issues as so framed, there were several others which were presented during the course of the trial and these should also be decided.

First, as to the issues framed in the pretrial order, I find as follows:

The first issue framed is "Whether the defendants or any of them entered into an agreement of joint venture with the two plaintiffs in 1955 or with plaintiff Butler for the procurement by the plaintiffs of a party ready, willing and able to enter into a contract with the defendants Glenn McCarthy, Inc. and Glenn McCarthy"—presumably and/or Glenn McCarthy, Inc. alone. I am interpolating now—"for the expenditure of approximately $2,000,000 for financing the further development of the defendants' oil and gas concession of 970,000 acres of land in Bolivia.

As to that issue, I find that the plaintiffs have failed to establish that there was any agreement of joint venture between them, or either of them, and the defendants, or any of them, for the procurement by the plaintiffs of a party ready, willing and able to enter into a contract with defendants Glenn McCarthy, Inc. and Glenn McCarthy, or with either of them, for the expenditure of approximately $2,000,000 for financing the further development of the Bolivian concession.

During the course of the trial from time to time there were some indications that the plaintiffs were not pressing their theory of a joint venture. If this were so, this was a wise point of view, as I see it. Nothing could be further from a joint venture than the transactions which are involved in this case. These two plaintiffs are nothing more than brokers who were trying to arrange for the

financing of a business transaction. If they are joint venturers with the defendants, so is every broker. There is nothing here which indicates that all the parties "pooled their efforts (or had) a mutual right to control the transaction, that the plaintiffs were to share in the losses * * *." Wagner *v.* Derecktor, 306 N. Y. 386. There was not even any right to share in the profits of the transaction, which even had it existed, would not conclusively establish a joint venture. Jacobs *v.* Escoett, 265 App. Div. 111. See, also, Jasper *v.* Bernstein, 250 App. Div. 638.

Here Butler, during the course of the transaction, thought only in terms of compensation for his services. During his conversations with William McCarthy, Cunningham and Glenn McCarthy, it is quite clear from the testimony that his only thought was to receive some compensation or compensation of some sort for his work. It seems to me he would have been surprised, to say the least, had it been suggested to him that he was participating in the risks of the joint venture in any manner whatsoever.

The second issue formulated by the pre-trial order reads as follows, "Whether the defendants promised plaintiff Butler that if he procured such a party," that is, a party to finance the Bolivian concession, "defendants were to assign to plaintiff Butler a 'carried interest' in the aforesaid concession, free of development overriding costs to Butler or a 5 per cent overriding royalty, or to pay to Butler 5 per cent of the money which such financier should agree to invest in the concession," and, as a second question, "Whether the defendants also authorized plaintiff Butler to engage plaintiff Benton's services and to agree in its behalf to assign to plaintiff Benton a carried 5 per cent interest in the aforesaid concession free of all costs of development and operating expenses to Benton, provided that plaintiff Benton obtained such a party in company with the plaintiff Butler to finance the development of the concession."

As to this second issue, I find that the plaintiff Butler was never promised by the defendants or any of them that the defendants were to assign to them a carried interest in the concession, or a 5 per cent overriding royalty, or 5 per cent of the money which might be invested by a prospective financier in the concession.

I further find that Butler was never authorized by the defendants to engage Benton's services or to make any arrangement with Benton on the defendants' behalf. Thus, as far as Benton is concerned, Benton has no connection whatsoever with the defendants, and has no rights whatsoever against them.

The third issue framed is whether, and I quote again, "Whether, if defendants did not so authorize Butler to agree to pay Benton a 5 per cent carried interest, defendants had promised to pay plaintiff Butler a 10 per cent carried interest plus 5 per cent of the money which such financier should agree to invest in the concession. If the question is not answered in the affirmative, what did defendants promise to pay the defendant Butler.

As to the third issue so framed, I find there was no agreement on the part of the defendants, or any of them, to pay Butler a 10 per cent carried interest in the concession, plus five per cent of the money which a financier might agree to invest in the concession. The only agreement made by any of the defendants was an agreement by defendant Glenn McCarthy, Inc., through its president, Glenn McCarthy, to pay to the plaintiff Butler a reasonable commission for procuring financing for the Bolivian concession to be payable progressively only upon the payment by the prospective financier to Glenn McCarthy, Inc. of the various amounts of financing due to be paid by such prospective financier. The evidence makes it quite clear that in no event was Butler to be paid unless and until the moneys by way of financing were actually paid by the prospective financier to Glenn McCarthy, Inc.; that is to say, perhaps he would have been entitled, and may well have been, to

progressive payments as financing payments were made, but no payments until such financing payments started. By way of reference, see Fuller *v.* Bradley Contracting Co., 183 App. Div. 6, aff'd 229 N. Y. 505; Amies *v.* Wesenofske, 255 N. Y. 156; Wiessenberger *v.* Mayers, 281 App. Div. 171. Cf. Wagner *v.* Derecktor, 306 N. Y. 386.

The fourth issue, as framed by the pleadings, is "Whether Glenn McCarthy, Inc. and Glenn McCarthy, individually, assumed liability for all commissions, brokerage fees or finders' fees payable by reason of the Keljikan Commercial Corporation and Glenn McCarthy, Inc. executing their agreement of June 20, 1955."

As to issue No. 4, I find that Glenn McCarthy, Inc. assumed liability for all commissions, brokerage fees or finders fees payable by reason of the execution of the June 20, 1955 agreement between Keljikan Commercial Corporation and Glenn McCarthy, Inc., but, since there were no such commissions, brokerage fees or finders fees payable by reason of the execution and they were not payable until there were actually financing payments made, there was no liability on the part of Glenn McCarthy, Inc. to the plaintiffs or either of them. On this question, I further find that Glenn McCarthy, individually, assumed no liability at any time for the payment of any commissions, brokerage fees or finders fees in connection with this transaction.

In this connection, I should say that Section 5 of the June 20, 1955 agreement between the Keljikan Commercial Corporation and Glenn McCarthy, Inc., which provides for the payment by Glenn McCarthy, Inc. of such commissions, was inserted in the contract at the request of the Keljikans as a normal incident of protection to them in connection with a contract of this character. It has no factual or legal significance in so far as a binding obligation on the part of Glenn McCarthy, Inc. to these plaintiffs, or either of them, is concerned.

The fifth framed issue is, "Whether the plaintiffs were the procuring cause of producing Keljikan Commercial Corporation to enter into the agreement between it and Glenn McCarthy, Inc. of June 20, 1955."

As to five, I find that the plaintiff Benton introduced the Keljikans to the plaintiff Butler and the plaintiff Butler introduced the Keljikans to the defendants. However, I find that the proposal for financing on a 60-40 basis which Butler presented to the Keljikans was not authorized by Glenn McCarthy, Inc. or Glenn McCarthy, on its behalf, nor did the Keljikans ever accept Butler's proposal. The agreement of June 20, 1955 entered into between Keljikan and Glenn McCarthy, Inc. did not embody the proposal which Butler presented to the Keljikans as the proposal of Glenn McCarthy, Inc. It is apparent from the testimony of the Kiljikan brothers on the stand, and Glenn McCarthy, which I accept, that the proposal discussed between Glenn McCarthy and the Keljikans, negotiations concerning which resulted in the contract of June 20, 1955, was a matching deal for a 50-50 arrangement on a 50-50 basis. The 60-40 proposal made by Butler was made for the purpose of enabling himself and Benton to acquire a 10 per cent interest in the concession, was not in the best interests of either of the parties to the June 20th agreement and, in fact, was never the subject even of negotiations between the Keljikans and the representatives of Glenn McCarthy, Inc.

In view of what has been said, it is unnecessary to determine framed issues 6, 7, 8 and 9 relating to the actions of the parties with respect to the June 20th, 1955 contract, after it was executed, and with respect to the subject matter of the value of a 5 per cent carried interest in the Bolivian concession.

For the purposes of the record, however, I find that Glenn McCarthy, Inc. in good faith attempted to carry out its obligations under the contract of June 20, 1955. These included securing from the Mutual Security Agency of the United States Government a guarantee against expropria-

tion of the lease and a guarantee of the convertibility of funds derived from the sale of oil and gas produced from the lease into United States dollars. However, Glenn McCarthy, Inc. was unable to comply with these conditions within a reasonable time after the execution of the contract.

I find that the contract of June 20, 1955 was terminated by mutual consent of the parties on April 23, 1956, after efforts in good faith by Glenn McCarthy, Inc. to comply with the terms and conditions thereof.

I find, further, that such termination by the parties was in good faith and arose because of difficulties and complications during the period of time when the contract remained in effect. These complications included the difficulties of obtaining the necessary guarantees against expropriation and as to convertibility, and the need for substantially greater financing than the Keljikans were prepared to supply, in view of the prospects opened up by negotiations with the Anaconda Copper Company and its subsidiaries and representatives. In fact, these difficulties and complications are in themselves an indication of the reason why the understanding between Glenn McCarthy, Inc. and Butler for the payment of commissions was conditioned upon the actual receipt of money by way of financing by Glenn McCarthy, Inc. from the Keljikans or any other financier.

As I have previously pointed out, in the absence of such payment there was no liability whatsoever on the part of Glenn McCarthy, Inc. to Butler and, therefore, in my view of the case, the above finding as to what happened subsequent to the execution of the contract is largely academic.

Additional issues which should be decided for the purposes of the record are as follows:

1. Did William McCarthy have any authority to make binding agreements on behalf of Glenn McCarthy or Glenn McCarthy, Inc. with respect to the payment of commissions to Butler or Benton, or either of them, for procuring financing of the Bolivian concession?

2. Did David Cunningham have any such authority?

3. Are the plaintiffs or either of them, entitled to recover from the defendants, or any of them, for services rendered in connection with the transaction which was embodied in the agreement between the Keljikans and Glenn McCarthy, Inc. of June 20, 1955, or for introducing the Keljikans to Glenn McCarthy, or for any other services rendered in connection with the Bolivian concession?

4. Are the plaintiffs, or either of them, entitled to a brokerage commission for producing the Keljikans as the parties who entered into the agreement for financing of the Bolivian concession with Glenn McCarthy, Inc. of June 20, 1955?

As to the questions of the authority of William McCarthy and David Cunningham, I find that William McCarthy had no authority whatsoever to bind Glenn McCarthy or Glenn McCarthy, Inc. to any arrangement for the payment of commissions for the financing of the Bolivian concession. Quite apart from this, however, I find that William McCarthy never represented to Butler or Benton that he had such authority, and, in fact, at all times made it clear to them that he had no such authority. I also find that at no time did Glenn McCarthy ever represent to Butler, or indeed to Benton, whom he never saw at all, that William McCarthy had any such authority; nor was William McCarthy clothed with apparent authority by any action of William McCarthy, or its president, Glenn McCarthy, or any authorized agent of the corporation. See, Skutt, Inc. *v.* Goodwin, Ltd., 251 App. Div. 84, and Gumpert *v.* Bon Ami Co., 2 Cir., 251 F. 2d 735, 738.

The same findings are made with respect to the authority of David Cunningham. David Cunningham was a lawyer representing a client and performing legal ser-

vices for him. All that Cunningham did was to perform the usual services of a lawyer and to transmit from time to time information concerning the project to Butler and Benton and prospective purchasers. This, Butler and Benton, as lawyers themselves, knew, or should have known. There was no reason whatsoever for them to be in any way misled as to the functions of David Cunningham or the authority which he possessed. Indeed, like William McCarthy, David Cunningham at no time represented to either Butler or Benton that he had any authority to bind Glenn McCarthy or Glenn McCarthy, Inc. and made it quite clear that he had no such authority. As in the case of William McCarthy, no acts of Glenn McCarthy, Inc., or Glenn McCarthy, clothed Cunningham with any apparent authority so to act.

As an example, when Cunningham drafted the three letters dated June 17, 1955 regarding the compensation claimed by Benton and Hopkins, he made it quite plain to them that any arrangements for compensation were entirely in the hands of Glenn McCarthy and that he, Cunningham, had no authority to make any arrangements with respect thereto.

In all previous discussions of compensation with the plaintiffs, or either of them, the same thing was made quite clear to the plaintiffs. In the first meeting between Benton and William McCarthy at which Butler was present, William McCarthy expressly told the plaintiff that he had no authority and that the only person who could make an arrangement with respect to commissions was Glenn McCarthy himself.

With respect to *quantum meruit* and brokerage, a cause of action in *quantum meruit* was added to the complaint on the plaintiff's motion, with permission of the Court, at the close of the plaintiff's case.

Since any commissions payable by Glenn McCarthy, Inc. to Butler were governed by understanding between these two parties and were made specifically dependent upon the

actual receipt of payments by Glenn McCarthy, Inc. from the financier in this case the Keljikans, it is quite plain that there is no liability in *quantum meruit* on the part of defendant Glenn McCarthy, Inc.; nor is there any liability for the payment of brokerage commissions other than as fixed by the understanding between Glenn McCarthy, Inc. and Butler with respect to the subject matter, as I have previously found. Such services by way of introduction or otherwise as Butler performed were undertaken by him upon the understanding that he would receive compensation by way of commissions if, and only if, Glenn McCarthy, Inc. actually received payment by way of financing or consideration from the sale of the one-half interest in the concession and not otherwise. Since that condition never was fulfilled there can be no recovery on Butler's part on a *quantum meruit* or brokerage theory.

A word as to the liability of the individual defendants in this case as distinguished from the corporate defendant, Glenn McCarthy, Inc. As to William McCarthy, I have already pointed out that William McCarthy was not authorized by Glenn McCarthy, Inc. or Glenn McCarthy to make any agreement with Butler or Benton, or either of them, with respect to compensation for obtaining financing for the Bolivian concession, and that William McCarthy did not represent to the plaintiffs, or either of them, that he had such authority. This in itself might be thought sufficient to relieve William McCarthy from any liability to these plaintiffs, but in case there be any doubt about the matter, I find that no such liability exists, and that at no time did William McCarthy make any agreement of any kind with plaintiffs whereby he became liable on his own behalf for any acts of plaintiffs, or either of them, in procuring financing for the Bolivian concession or otherwise. Moreover, the plaintiffs performed no service for William McCarthy or any kind for which William McCarthy might be held liable on a *quantum meruit* basis.

As far as the individual defendant Glenn McCarthy is concerned, I find that Glenn McCarthy was acting throughout these transactions solely in his capacity as president of Glenn McCarthy, Inc. and not individually. Since I have found that Glenn McCarthy, Inc. is not liable in any respect to these plaintiffs, it follows that Glenn McCarthy is not liable either. So that the matter may be entirely clear, however, I find that at no time did Glenn McCarthy enter into any arrangement individually with the plaintiffs, or either of them, by which he undertook any obligation individually to pay to the plaintiffs any sums by way of commissions in connection with the Bolivian concession and he is not liable therefor. Nor did the plaintiffs, or either of them, perform any services for Glenn McCarthy individually by which Glenn McCarthy became liable to them, or either of them, in *quantum meruit* for the reasonable value of their services by way of brokerage or otherwise.

What has been already said makes it unnecessary to discuss the defense of the statute of frauds under Section 31(10) of the New York Personal Property law which the defendants were permitted to interpose by motion during the course of the trial.

The plaintiffs have laid great emphasis on the credibility to be given to the testimony adduced on their behalf and to that adduced on behalf of the defendants, and have urged that this is a controlling factor in the case. Plaintiffs have taken the position that if the Court believes the testimony given on their behalf it must find for them. I do not find this to be so. For even on plaintiffs' version of the facts there is at the least grave doubt as to whether Butler made out a prima facie liability and even greater doubt as to Benton.

But quite apart from this, in so far as the versions of the parties with respect to the transactions between them differ, as they do in material respects, I find that the plaintiffs' version of the transactions is not credible in the light of all the evidence and all of the facts and circumstances. View-

ing the testimony as a whole against the circumstances and background of these transactions, it is inconceivable to me that the defendant Glenn McCarthy, Inc. or Glenn McCarthy on its behalf, agreed or would have agreed to give to each of the plaintiffs Butler and Benton a 5 per cent carried interest in the Bolivian concession as the plaintiffs claim. Nor is it conceivable that there was any agreement to give Butler any carried interest in the concession. The most that can be said is that the Glenn McCarthy, Inc., through its president Glenn McCarthy, agreed to pay the plaintiff Butler a reasonable commission in consideration of procuring financing for the Bolivian concession satisfactory to McCarthy, Inc. in the sum of $2,000,000, such commission to be payable progressively if and when moneys were actually paid to Glenn McCarthy, Inc. by the parties so procured.

I find that Glenn McCarthy, acting on behalf of Glenn McCarthy, Inc., made this plain to Butler at the meeting in Houston, Texas, on or about March 9, 1955, when commissions on the so-called Pullman transaction were discussed, and his conduct throughout these transactions indicates to me that he never deviated from this position. Butler, at least, acquiesced in this understanding, and his own testimony indicates that this was his own understanding of the arrangement. Butler's attempts to procure through David Cunningham a letter from Glenn McCarthy altering these arrangements was unavailing and Glenn McCarthy was under no obligation to pay commissions otherwise than in accordance with his understanding. The understanding always was that Butler was to receive compensation by way of commissions of a reasonable amount, payable progressively upon the receipt of actual payments by Glenn McCarthy, Inc. from the proposed financier. Such an agreement is neither unconscionable nor unreasonable. As Judge Andrews stated in Colvin *v.* Post Mortgage & Land Co., 225 N. Y. 510, 517:

"No collections, no commissions has a fair business appeal to both seller and broker."

And see Bliven *v.* Lighthouse, 231 N. Y. 64.

Such dealings as McCarthy had were entirely with Butler and Butler had no reason whatsoever to expect that he would become entitled to anything other than what Glenn McCarthy undertook to pay him in his letter of June 20, 1955, which was conditioned upon actual payment by the Keljikans to Glenn McCarthy, Inc. of the consideration and for the transfer to the Keljikans of a one-half interest in the concession.

As far as the plaintiff Benton is concerned, he was nothing more than a pure volunteer who brought to Butler a prospective financier for the Bolivian concession in the hope that if financing were produced he would be compensated in some manner by someone. No authorized agent of Glenn McCarthy, Inc. entered into any agreement with Benton or anyone else to compensate him by way of commissions or otherwise. In so far as Glenn McCarthy, Inc. was concerned, Benton was a stranger to these transactions. No services were performed by Benton for Glenn McCarthy, Inc. at the instance and request of Glenn McCarthy, Inc. or any of its authorized agents. The only understanding of any kind which Glenn McCarthy, Inc. had with respect to compensation or commissions was with Butler. It may be that if Butler had become entitled to any commissions, Benton might have been entitled to share in them, but Benton had no independent rights whatsoever against Glenn McCarthy, Inc., or the individual defendants arising out of these transactions.

As to the so-called 60-40 deal the plaintiffs claim was presented to the Keljikans by them, I find that no such deal was ever authorized by Glenn McCarthy or Glenn McCarthy, Inc., and that this was made clear to the Keljikans at the very outset of the negotiations that Glenn McCarthy had with them on behalf of his corporation and

also to Butler. The evidence makes it quite plain to me that the 60-40 proposition originally presented by Butler to the Keljikans was simply an unsuccessful attempt by Butler and Benton, without authority from McCarthy or anyone else, to obtain an interest in the concession of 10 per cent to which they were not entitled on any theory whatsoever.

The Keljikans were quite aware that the deal had been shopped around all over New York, and, in fact, in other sections of the country on a 50-50 basis and there was not the slightest reason to suppose that a deal on any other basis was possible.

In view of what happened during the course of the trial concerning the letter of June 4, 1955, signed by Butler at Benton's instance, and delivered to Benton, I feel I should make a special finding on that subject. I do this because there were indications during the course of the trial that the June 4 letter, instead of being signed on that date, had been in fact prepared and signed subsequent to the execution of the Keljikan agreement, and while litigation between Benton and McCarthy was at least contemplated, if not actually pending. If this had been the fact, there would have been a serious question in my mind as to whether or not there had been an attempt on the part of the plaintiffs to manufacture evidence. Without going further into the matter at this time, it is apparent this would have posed some serious questions indeed.

In the light of all the testimony, however, I now find that the letter of June 4, 1955 was in fact executed on or about that date and prior to the execution of the agreement between Glenn McCarthy, Inc. and the Keljikans executed on June 20, 1955. These findings remove the suspicion that the plaintiff Benton, a member of the New York bar, and the plaintiff Butler, a member of the California bar, were concerned in any attempt to concoct a letter of this character and have it executed subsequent to the date of the Keljikan-McCarthy, Inc. agreement for later use as evi-

dence or otherwise, and I expressly clear these two attorneys of any such implication.

That is not to say, however, that I consider the letter of June 4 to have any probative value in support of the plaintiff's case. I find that the plaintiff Butler had no authority whatsoever to execute such a letter on behalf of Glenn McCarthy or Glenn McCarthy, Inc. or any of the other defendants. And I find further that the plaintiff Benton knew very well that Butler had no such authority. Thus, the June 4 letter is in no way binding upon the defendants or any of them.

The only effect of the letter, in my view, is to indicate that the plaintiffs were determined to press their claim to a carried interest in the Bolivian concession despite the fact that they were not entitled to such a carried interest and had no legal basis for it.

I conclude, therefore, that the defendants and each of them are entitled to judgment against the plaintiffs on each of the causes of action asserted in the complaint and that the defendants shall have judgment accordingly.

* * * * * *

FILED
SEP 20 1960
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

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PETITIONERS' BRIEF IN REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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Petitioners are reluctantly impelled by material misstatements of critical facts in respondents' brief in opposition to file this brief.

POINT I

RESPONDENTS DISTORT THE FACTS OF THE DISTRICT COURT'S FINDINGS

Respondents attempt to destroy petitioners' principal ground for the writ, viz. that respondents as principals may not rely upon non-performance of a condition precedent to escape liability for commission to a broker when non-performance was caused by their own fault. They misstate as a fact that it is "plain from the findings below that this question is not in the case." (p. 2).

Respondents then misstate as a fact that

> "The District Court found: that the *frustration* of the financing agreement brought about by the plaintiff's efforts *was not the result of non-performance of a condition precedent;* that the financing agreement was terminated in good faith, and *by reason of circumstances beyond the control of the* parties; * * *" (Italics supplied)

The italicized portion of the statement is a distortion, and misleading.

Respondents make no attempt to cite or quote any part of the findings of the District Court claimed to support their reckless statement of critical facts. Being a misstatement of fact of what the District Court found as facts, the statement is not excusable as an argument.

The total findings by the District Court in any way relating to the statements of facts by respondents are only as follows (Appendix to Appellants' Brief, court of Appeals, blue cover, R. 2038-2039):

> "For the purposes of the record, however, I find that Glenn McCarthy, Inc. in good faith attempted to carry out its obligations under the contract of June 20, 1955. These included securing from the Mutual Security Agency of the United States Government a guarantee against expropriation of the lease and a guarantee of the convertibility of funds derived from the sale of oil and gas produced from the lease into United States dollars. However, Glenn McCarthy, Inc. *was unable to comply with these conditions within a reasonable time after the execution of the contract.*
>
> "I find that the contract of June 20, 1955 was terminated by mutual consent of the parties on April 23, 1956, after efforts in good faith by Glenn

McCarthy, Inc. to comply with the terms and conditions thereof.

"I find, further, that such termination by the parties was in good faith and arose because of *difficulties and complications* during the period of time when the contract remained in effect. These complications included the difficulties of obtaining the necessary guarantees against expropriation and as to convertibility and the need for substantially greater financing than the Keljikans were prepared to supply, in view of the prospects opened up by negotiations with the Anaconda Copper Company and its subsidiaries and representatives. In fact, these difficulties and complications are in themselves an indication of the reason why the understanding between Glenn McCarthy, Inc. and Butler for the payment of commissions was conditioned upon the actual receipt of money by way of financing by Glenn McCarthy, Inc. from the Keljikans or any other financier." (Italics supplied)

It is thus clear that respondents' misstatement of fact that the District Court found that the "frustration of the financing agreement brought about by the plaintiffs' efforts *was not the result of nonperformance of a condition precedent*" and that the "financing agreement was terminated in good faith, and *by reason of circumstances beyond the control of the parties*" is untrue and if not compared with the real findings would be misleading.

Neither the District Court, nor the Court of Appeals, made any such findings of facts; nor did their opinions imply any such findings of facts.

The most that can be said about the findings of the District Court is that McCarthy attempted to perform

his obligations the performance of which would have required the payment of the purchase consideration, and the payment of the commission; that he was unable to do so within a reasonable time; that the June 20, 1955 sales contract was terminated April 23, 1956 by mutual consent of the parties after failure of McCarthy to perform his obligations; and that such termination was in good faith and resulted because of unexplained difficulties and complications, while the sales contract was in force, of obtaining the guarantees against expropriation and for convertibility of foreign funds into dollars, and of the need for greater financing than the purchaser was prepared to supply in view of the prospects for profit presented by negotiations with Anaconda Copper Company.

Nowhere is there any finding that the "frustration" of the financing agreement "*was not the result of nonperformance of a condition precedent*", nor any finding that the termination of the financing agreement was "*by reason of circumstances beyond the control of the parties.*"

The Court of Appeals, in appraising and stating the ultimate facts, simply noted that defendants were "*unable*" to procure the guarantees ("within a reasonable time after the execution of the contract" as found by the District Court), for which reason "the agreement was terminated without any payment being made by Keljikan." The procurement of the guarantees was a condition precedent to the payment of the purchase consideration, and as respondents were unable to perform that condition precedent expressly assumed, they cannot rely upon the condition precedent to escape liability for the commission.

The full and correct facts on that subject are stated at pages 5-10 of the petition herein.

Even if it were true that the termination of the sales contract was by reason of circumstances beyond the control of respondents, the non-performance of the condition precedent deliberately assumed and represented to being readily performable, could not excuse respondents from responsibility for failure to perform the condition precedent—especially where, as here, the termination of the contract was induced by the obligor's desire and purpose to make a more profitable transaction with parties other than the purchaser. See authorities in petition, *Gaston*, p. 24, *O'Hara*, p. 27, and *Holman*, p. 28.

Petitioners show that respondents' attorney in the Courts below, Mr. Mittelman, whose conduct is referred to at page 13 of the petition, does not appear of record in this proceeding.

POINT II

RESPONDENTS' POSITION IS BASELESS AND DEFENSELESS

Except for respondents' distortions of the findings of fact by the District Court that cannot be excused as permissible argument; respondents fail wholly to show any defense to the compelling grounds asserted by petitioners for the granting of the writ.

CONCLUSION

For the compelling reasons aforesaid, and the true facts set forth in the petition for the writ that are uncontradictable, petitioners pray that the Court will forthwith,

(a) issue its writ of certiorari;

(b) concurrently reverse the judgments of the U. S. Court of Appeals and the District Court, and adjudge that liability on the express agreement between the parties exists for the "reasonable percentage" of the financing contracted to be paid to respondent corporation, despite the fact that the financing payments were not made, by reason of its non-performance of the conditions precedent to the payment of the purchase price and its termination of the sales agreement; and

(c) issue an order to respondents to show factual and legal cause, by sworn answer, why the judgment of the District Court should not be also reversed insofar as it holds that petitioner Benton is not also entitled to judgment with his co-broker and co-petitioner Butler for his share of the commission, and insofar as it holds that Glenn McCarthy individually is not jointly and severally liable for the commission—all as shown on pages 18-21 of the petition herein.

If the Court should not grant the relief prayed under (b) above, it is respectfully urged that the order under (c) should require respondents also to show cause why the judgment of the District Court should not also be reversed insofar as it holds that the promise to pay the commission was conditioned upon the purchase consideration being actually received by Glenn McCarthy, Inc.—for all the reasons shown on pages 13-18 of the petition herein.

If the writ be granted, but the further relief prayed hereinabove in (c) be not concurrently granted, petitioners pray that the Court will concurrently reverse the decision of the Court of Appeals as prayed in (b) above, and direct a new trial of the remaining issues.

Respondents' total failure to disprove the real facts set forth in the petition, the evidence and the controlling law as also set forth in the petition, their dismal failure to assert any honest "matter or ground why the cause should not be reviewed by this Court", and their bold and false description of the facts found by the trial court, justify the issue of the writ and the reversal of the judgment of the United States Court of Appeals, and the order to show cause above prayed, to avoid the costly and burdensome process of printing and considering a large record on points not subject to fair contradiction, and in conformity with the purpose of the Federal Rules of Civil Procedure, No. 1:

> "They shall be construed to secure the just, SPEEDY, and INEXPENSIVE determination of every action."

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NOTE: Having been unable to obtain the views of New York co-counsel within the limited time available, their names do not appear on this brief.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 308

THADDEUS G. BENTON AND J. LAMAR BUTLER,
Petitioners,

v.

GLENN McCARTHY, GLENN McCARTHY, INC., AND
WILLIAM McCARTHY, *Respondents.*

PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioners,

v.

GLENN McCARTHY, GLENN McCARTHY, INC., AND
WILLIAM McCARTHY, *Respondents*

PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Your petitioners respectfully pray a rehearing by the Court of their petition for a writ of certiorari, on the following grounds:

1. The District Court and the United States Court of Appeals struck down and ignored the Constitutional requirement, implemented by the United States Statute (28 U.S.C., sec. 1652) and the decisions of this Court in *Erie* v. *Tompkins* and successive decisions by

completely ignoring the controlling New York and Texas rules of decision determinative of the rights of the parties, and by substituting their personal philosophy as to what the law should be in commercial transactions, in plain disregard of the law announced in the 18 decisions of this Court, the U. S. Court of Appeals for the Second Circuit, the Court of Appeals of New York and the high courts of Texas. (See petition for the writ, pp. 22-30). Based alone on the findings of the Court of Appeals in its interpretation of the findings of the District Court, the law compels the reversal of the judgment below and a new trial based on the correct rule of law to be re-announced by this Court, in which new trial the true credibility of the evidence will be known by the trial court.

2. The decision of the Court of Appeals is in direct conflict with the 18 decisions cited by petitioners, and for that reason also the writ should issue.

3. Petitioners were not granted a fair trial inasmuch as the findings of the trial court were induced by critically false testimony of William McCarthy, and false representations to the Court by Leo B. Mittelman, defendants' trial counsel, who were in fact *at that time* guilty of felonies as proved by their subsequent convictions, and by the perjurious testimony of Glenn McCarthy. Proper weight of their testimony and declarations to the court has, therefore, never been taken into account, although the Court of Appeals found that petitioners had demonstrated "the conflicting nature of the testimony" for which reason "we find no reason to disturb his resolution of the conflict in favor of defendants". Hence the sufficiency of the *real evidence* (the truly credible evidence, remaining after the proper impeachment of William McCarthy and Leo B. Mittel-

man) was not and could not have been considered by the Court of Appeals as required by FRCP 52 (b), or by the trial court.

4. Unless the Court issues the writ, if only for determination solely of the legal and constitutional question presented, based on the findings of the Court of Appeals, and orders a new trial, petitioners will suffer the loss of hundreds of thousands of well earned dollars, and by reason of a simple, but monumental travesty upon the law by the lower courts, in violation of Constitutional principles.

5. In the prosecution of the petition for the writ, the undersigned attorney has had the counsel and support of nine other attorneys of high standing, of whom the names of seven have appeared on the papers in this Court. Some have served as friends of the law, without expectation of compensation.

CONCLUSION

It is therefore respectfully urged that the principles involved by the wrongful decisions below are of such grave nature and would have such a devastating effect upon the principle of *stare decisis*, in the administration of the law in the United States, and further confusion, that the Court should grant the writ.

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CERTIFICATE OF COUNSEL

The foregoing petition for rehearing is presented in good faith and not for delay.

The grounds for the petition for rehearing are substantial grounds available to petitioner, although not previously presented as here, as they are limited to the request that the Court review only the faulty legal conclusion of the Court of Appeals and the District Court, involving the denial of petitioners' Constitutional rights, which, when done, would require the remand of the action for a new trial in accordance with the law as announced by this Court; the review would not involve a review of the fact determinations of either lower court. Such denial of Constitutional rights was presented in the petition for the writ, which asked the whole review of the judgments below. So that the Court is now asked to review only the Constitutional question, and not the subsidiary questions involving fact findings,—all based on the Court of Appeals' recital of the controlling facts. The petition is thus restricted to the grounds aforesaid, in the belief that they are within the meaning of Rule 58 of the Court.

THADDEUS G. BENTON